802.63
801.15

Verne, B. Michael

From: [redacted]
Sent: Friday, November 19, 2010 2:01 PM
To: Verne, B. Michael
Subject: 802.63/801.15 Q

Mike:

This email describes a proposed transaction that implicates 16 C.F.R. Sections 802.63 and 801.15. Based on our prior discussions and my review of the publicly available materials, we believe the proposed transactions would be exempt from HSR filing obligations pursuant to Rule 802.63 and 801.15 (as to the second step). After you have had an opportunity to review this email, please let me know whether you agree with the analysis presented below or if your view differs. If you need further details in order to supply a view, please let me know.

FACTS

1. Target is in financial distress and is negotiating a bona fide debt workout with its creditors. The workout is likely to be undertaken in the context of a Chapter 11 bankruptcy proceeding. However, it is possible that the workout may be consummated privately, without bankruptcy court oversight.

2. Creditor A and Creditor B (our clients) are two of the significant creditors of Target. Creditor A and Creditor B is each a private equity investor that invests in companies such as Target in the ordinary course of its business. The debt held by Creditor A and Creditor B is comprised of senior subordinated note claims and term loan claims.

3. The proposed debt workout incorporates a number of elements, as it relates to Creditor A and Creditor B:

a. Each of Creditor A and Creditor B (as well as other creditors) will extinguish senior subordinated note claims in exchange for shares of newly issued common stock of Reorganized Target.

b. Each of Creditor A and Creditor B will convert claims arising from a certain term loan into newly issued common stock of Reorganized Target or shares of newly issued preferred stock of Reorganized Target.

c. Holders of senior subordinated note claims (including Creditor A and Creditor B), in addition to receiving their *pro rata* share of newly issued common stock (referenced in 3a, above), will receive the right to participate in a Rights Offering whereby the participants may subscribe for their *pro rata* share of up to an additional $70 million worth of shares of newly issued common stock of the Reorganized Target.

d. Creditor A and Creditor B have agreed, in exchange for a fee to be paid in shares of newly issued common stock (at most, approximately $4.1 million worth of newly issued common stock, in the aggregate), to backstop the $70 million Rights Offering. In the event no holders of senior subordinated note claims choose to participate in the Rights Offering, Creditor A would be expected to have to subscribe for approximately 79% of the backstop commitment (approximately $55.3 million). However, under certain scenarios (for instance, if Creditor B breaches its backstop purchase obligation), Creditor A may purchase the remainder of the unsubscribed portion of the Rights Offering. Thus, it is possible that Creditor A (or Creditor B in the event that Creditor A breaches its purchase obligation) may ultimately subscribe for more than $63.4 million of newly issued common stock of Reorganized Target as a result of its commitment to backstop the Rights Offering.

4. Neither Creditor A nor Creditor B currently holds a controlling interest in any entity that may be viewed as standing in a competitive relationship to Target.

5. Creditor A and Creditor B may enter into a bilateral agreement (without Reorganized Target as a party to the agreement) outside of the debt workout that would grant to Creditor A an option to acquire sufficient shares from Creditor B that would take Creditor A to a 50% or greater position in Reorganized Target. That option would be

exercisable after the debt workout (or plan or reorganization) has been consummated. The incremental value of the additional shares to be acquired from Creditor B is expected to have a value of not more than $63.4 million.

ANALYSIS

A. The Restructuring Transactions: We do not believe the foregoing proposed transactions arising from the debt workout (or plan or reorganization) would implicate HSR filing obligations, regardless of the value of voting securities that Creditor A or Creditor B would hold as a result of the consummation of the restructuring since all of the elements of Creditor A's and Creditor B's "acquisition" would be exempt pursuant to 16 CFR 802.63(a), which provides:

Creditors. An acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default, or in connection with the establishment of a lease financing, or in connection with a bona fide debt work-out shall be exempt from the requirements of the act if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business.

Accordingly, the shares of newly issued common stock (described in paragraphs 3a and 3b) that may be acquired by Creditor A and Creditor B in exchange for extinguishing creditor claims would be covered by the Rule 802.63 (a) exemption, and the associated value of such common stock (and/or preferred stock) is disregarded for purposes of the HSR Act (including for purposes of applying the "size-of-transaction" test).

As to the shares of newly issued common stock that Creditor A (or Creditor B) may be entitled to purchase on a *pro rata* basis, or may become obligated to purchase as a consequence of its commitment to backstop the Rights Offering, we understand that (i) since the Rights Offering is being done in connection with, and as a critical element of, a *bona fide debt work-out* and (ii) Creditor A holds its creditor position, and its right to participate in the Rights Offering, as a result of a *bona fide credit transaction entered into in the ordinary course of its business*, the shares to be acquired by either Creditor A or Creditor B (both its *pro rata* portion as well as any additional shares that it becomes obligated to purchase as a result of its backstop commitment) would similarly be covered by the exemption provided by Rule 802.63.

On the basis of the foregoing analysis, Creditor A and Creditor B may acquire the shares of voting securities of Reorganized Target (including those shares purchased as a result of its commitment to backstop the Rights Offering) without triggering a filing obligation under the HSR Act.

B. The Option Agreement: Pursuant to the application of the "aggregation" rule (16 C.F.R. 801.15(a)(2), any acquisition pursuant to the Option would not trigger a filing obligation under the HSR Act, so long as the shares being acquired pursuant to the option do not, by themselves, have a value in excess of the minimum notification threshold, since the shares acquired by Creditor A pursuant to the restructuring transactions would not be deemed to be "held" by Creditor A for purposes of the "size-of-transaction" test (since Section 802.63 is specifically included in Rule 801.15(a)(2)). Thus, as long as Creditor A would be acquiring shares with an incremental value that does not exceed $63.4 million (or whatever the relevant minimum threshold is at the time of the exercise of the Option) as a result of the exercise of the Option, an HSR filing obligation would not be triggered.

Thanks in advance for your assessment of the foregoing analysis and your valuable input.

Kind regards,

[redacted]

11/23/10